UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SAN FRANCISCO DIVISION OF JUDGES

PRIME HEALTCARE CENTINELA, LLC d/b/a CENTINELA HOSPITAL MEDICAL CENTER, Respondent,	**Cases 31-CA-030055 31-CA-030091 31-CA-068109 31-CA-072675**
and	
SEIU-UNITED HEALTHCARE WORKERS – WEST, Charging Party.	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS COMPLAINT, OR IN THE ALTERNATIVE TO STAY ALL PROCEEDINGS AND VACATE PRIOR PROCEEDINGS DUE TO LACK OF BOARD AUTHORITY TO ACT

On March 20, 2013, Respondent filed a Motion to Dismiss Complaint, or in the alternative to Stay All Proceedings and Vacate Prior Proceedings Due to Lack of Board Authority to Act (the "Motion"). In it, counsel for Respondent argues that the Board "since at least August 28, 2011, ..." does not have a constitutionally valid quorum of three members and therefore does not have authority to take lawful action "since January 4, 2012" in the case. Respondent bases its Motion on the decision of the D.C. Circuit Court of Appeals in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), and relies on the rationale of the court in that case. 102.24(b) of the Board's Rules and Regulations (Motions for summary judgment or dismissal must be filed with the Board "no later than 28 days prior to the scheduled hearing.")

I deny the Motion on the grounds that pursuant to Section 102.24(b) of the Board's Rules and Regulations (Motions for summary judgment or dismissal must be filed with the Board "no later than 28 days prior to the scheduled hearing"), the Motion is untimely as hearing closed on August 3, 2012 and it is misfiled not with the Board but in this forum. Moreover, I also deny the Motion to the extent that the Respondent is arguing that the Board lacks a constitutionally valid quorum. Although I recognize that the United States Court of Appeals for the District of Columbia Circuit accepted Respondent's identical argument in the *Noel Canning* case referenced above, that same argument was squarely rejected by the *en*

banc Eleventh Circuit in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004)(*en banc*), *cert. denied*, 544 U.S. 942 (2005).

Respondent's position also flies in the face of the constitutional text and history. Since the 19th Century, Presidents have made more than 400 recess appointments during intrasession recesses. Therefore, I reject Respondent's arguments. See also *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)("[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions").

Moreover, the theory put forward here by Respondent as voiced in the *Noel Canning* case that the President may fill only vacancies that arise during a recess has been considered and rejected by three courts of appeal, two of them sitting *en banc*. See *Evans*, 387 F.3d at 1226-27 (*en banc*); *United States v. Woodley*, 751 F2d. 1008, 1012-13 (9th Cir. 1985)(*en banc*); and *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). For these reasons, I find Respondent's reliance on the *Noel Canning* decision misplaced and reject its argument in this case. Alternatively, the question of whether there is a constitutionally valid quorum of Board members and proper related actions by them are questions that remain in litigation, and until such time as they are ultimately resolved, the Board and this forum are charged to fulfill its responsibilities under the Act. See *Stamford Plaza Hotel*, 359 NLRB No. 75, slip op. 1 at fn. 1 (March 13, 2013).

For these reasons, I **DENY** the Motion in its entirety.

Dated: March 26, 2013

Gerald M. Etchingham,
Associate Chief
Administrative Law Judge

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NLRB-SAN FRANCISCO

JOB #447

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	3/26	15:16	913105535583	EC--S	00′ 48″	002	OK
002		15:17	916192324302	EC--S	00′ 46″	002	OK
003		15:18	915103371023	EC--S	00′ 19″	002	OK
004		15:19	912134435098	EC--S	00′ 58″	002	OK

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